



Federal Register

**Monday,
April 24, 2000**

Part XXII

Equal Employment Opportunity Commission

Semiannual Regulatory Agenda

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Ch. XIV

Semiannual Regulatory Agenda

AGENCY: Equal Employment Opportunity Commission.

ACTION: Semiannual Regulatory Agenda.

SUMMARY: The Equal Employment Opportunity Commission (EEOC or

Commission) is publishing its semiannual regulatory agenda pursuant to Executive Order 12866, 58 FR 51735, and the Regulatory Flexibility Act, 5 U.S.C. chapter 6. The agenda lists all regulations that are scheduled for review or development during the next 12 months or that have been finalized since the publication of the last agenda.

FOR FURTHER INFORMATION CONTACT:

Ellen J. Vargyas, Legal Counsel, Office of Legal Counsel, Equal Employment Opportunity Commission, 1801 L Street

NW., Washington, DC 20507; telephone (202) 663-7197.

SUPPLEMENTARY INFORMATION: The Commission has identified six items for inclusion in this regulatory agenda.

Signed in Washington, DC, this 24th day of February 2000.

For the Commission.

Ida L. Castro,
Chairwoman.

Equal Employment Opportunity Commission—Proposed Rule Stage

Sequence Number	Title	Regulation Identification Number
3539	Federal Sector Equal Employment Opportunity	3046-AA57

Equal Employment Opportunity Commission—Final Rule Stage

Sequence Number	Title	Regulation Identification Number
3540	Waivers of Rights and Claims: Tender Back of Consideration	3046-AA68
3541	Clarification of Standards in Interpretive Appendix to ADA Regulations Regarding Mitigating Measures	3046-AA70

Equal Employment Opportunity Commission—Long-Term Actions

Sequence Number	Title	Regulation Identification Number
3542	Procedures—The Age Discrimination in Employment Act	3046-AA54
3543	Disparate Impact Under the Age Discrimination in Employment Act (ADEA)	3046-AA64
3544	Conforming Treatment of Federal Sector Administrative Judge Decisions	3046-AA71

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

Proposed Rule Stage

3539. FEDERAL SECTOR EQUAL EMPLOYMENT OPPORTUNITY

Priority: Other Significant

Legal Authority: PL 102-569, The Rehabilitation Act Amendments of 1992; 42 USC 2000e-16; 29 USC 794a

CFR Citation: 29 CFR 1614

Legal Deadline: None

Abstract: The Commission proposes to change its Federal sector equal employment opportunity regulations to implement the Rehabilitation Act Amendments of 1992. The 1992 amendments provide that the standards used to determine if title I of the

Americans with Disabilities Act has been violated will apply to complaints of nonaffirmative action employment discrimination under section 501 of the Rehabilitation Act.

Statement of Need: The Commission promulgated its latest regulation under section 501 of the Rehabilitation Act in April 1992, several months before Congress enacted the 1992 Rehabilitation Act Amendments. The Commission is thus proposing to amend its section 501 regulation, found at 29 CFR 1614.203, to implement the Rehabilitation Act Amendments.

Summary of Legal Basis: Pursuant to sections 501 and 505 of the Rehabilitation Act, the Commission is authorized to issue such regulations as it deems necessary to carry out its responsibilities under the Act. The proposed regulatory revisions are not required by statute or court order.

Alternatives: The Commission has consulted with stakeholders and has considered their suggested alternatives in developing this regulatory proposal. In addition, EEOC will publish the proposed regulatory amendments for public comment and will consider all offered alternatives prior to adoption of a final rule.

EEOC

Proposed Rule Stage

Anticipated Cost and Benefits: The proposed regulatory changes will enhance enforcement of the statutory requirements. Federal agencies and individuals will have a clearer understanding of their respective obligations and rights under the Rehabilitation Act. It is not anticipated that this proposal will result in increased costs.

Risks: The proposed regulatory changes will lessen the risk of noncompliance with statutory requirements by identifying and

providing detailed guidance on the appropriate legal standards governing Federal sector claims of nonaffirmative action employment discrimination under section 501 of the Rehabilitation Act. This proposal does not address risks to public health, safety, or the environment.

Timetable:

Action	Date	FR Cite
NPRM	03/01/00	65 FR 11019
NPRM Comment Period End	05/01/00	

Regulatory Flexibility Analysis Required: No

Government Levels Affected: Federal

Agency Contact: Carol Miaskoff, Assistant Legal Counsel, Office of Legal Counsel, Equal Employment Opportunity Commission, Room 6037, 1801 L Street NW, Washington, DC 20507

Phone: 202 663-4689

TDD Phone: 202 663-7026

Fax: 202 663-4639

RIN: 3046-AA57

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

Final Rule Stage

3540. WAIVERS OF RIGHTS AND CLAIMS: TENDER BACK OF CONSIDERATION

Priority: Other Significant

Legal Authority: 5 USC 522; 29 USC 628; 42 USC 2000e; 42 USC 12101; 29 USC 206(d)

CFR Citation: 29 CFR 1625

Legal Deadline: None

Abstract: Following the United States Supreme Court's decision in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), the Commission has developed proposed regulatory guidance on the status of consideration paid for a waiver of rights and claims under the laws it enforces.

Statement of Need: The Equal Employment Opportunity Commission (EEOC or Commission) is proposing to adopt legislative regulations addressing issues relating to the "tender back of consideration" in connection with waivers of rights and claims under the Age Discrimination in Employment Act of 1967 (ADEA). This issue was addressed by the United States Supreme Court in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998). In that decision, the Supreme Court held that an individual was not required to return (tender back) consideration (such as improved severance benefits, extra money, or early retirement) for a waiver in order to allege a violation of the ADEA. Prior to the Supreme Court's decision in *Oubre*, the Federal courts of appeals were split on the issue of whether an individual who signed a waiver agreement was required to tender back any consideration paid by the employer

in order to bring a claim under the ADEA. The Commission's proposed legislative rule would provide detailed regulatory guidance to the public on the tender back issue addressed by the Supreme Court's *Oubre* decision.

The ADEA was amended by title II of the Older Worker Benefits Protection Act of 1990 (OWBPA) to regulate the use of waivers for employees 40 years of age or older. Title II of OWBPA sets forth the statutory requirements for a valid waiver of rights under the ADEA. The Commission conducted a negotiated rulemaking in 1995 and 1996 on ADEA waivers under OWBPA. The Rulemaking Committee considered, but agreed not to resolve, the tender back issue, and it was not included in the regulatory language recommended by the Committee to the Commission. EEOC promulgated a final regulation on ADEA waivers at 29 CFR 1625.22 on June 5, 1998, 63 FR 30624. The preamble to the final regulation confirmed that the issues raised in the Supreme Court's *Oubre* decision would not be addressed in that regulation, but that the tender back issue would be covered in other EEOC guidance.

Since the enactment of OWBPA, employer and employee representatives have expressed continuing interest in receiving guidance on the issue of waiver agreements. The use of waiver agreements in the workplace is an increasingly common practice, particularly in connection with layoffs and reductions-in-force. The Supreme Court recognized in *Oubre* that requiring tender back of consideration, as a condition of bringing an ADEA suit, could frustrate the purposes of the

statute and lead to evasion of OWBPA's waiver requirements. Because of the importance of the tender back issue to both employers and employees, and based on input from stakeholders, the Commission believes that the public would benefit from regulatory guidance in this area.

Summary of Legal Basis: Section 9 of ADEA authorizes the Commission to issue such rules and regulations as it may consider necessary or appropriate for carrying out the Act. This regulatory proposal is not required by statute or court order.

Alternatives: The Commission will consider all alternatives offered by public commenters.

Anticipated Cost and Benefits: Providing a clear outline of what is and is not permissible concerning issues raised by the Supreme Court's *Oubre* decision will reduce employment disputes and save both employers and employees time and unnecessary costs. In addition, regulatory guidance on the issue of waiver agreements should result in increased voluntary resolution of potential employment disputes, and thereby reduce the likelihood of protracted and costly litigation. Finally, when necessary, regulatory guidance on tender back of consideration paid under waiver agreements will ensure that employees are able to challenge the validity of such agreements. It is not anticipated that any costs will arise from issuing the proposed regulatory guidance.

Risks: Regulatory guidance on tender back issues will lessen the risk that employees will be forestalled from challenging the validity of waivers

EEOC

Final Rule Stage

under the laws enforced by EEOC in the event that they are unable to tender back consideration. The Commission has a substantial interest in addressing this risk. The right of individual employees to challenge waiver agreements is essential to implement the strong public interest in eradicating discrimination in the workplace and is also a vital part of the statutory enforcement scheme of the ADEA, as well as the other laws enforced by the Commission. The proposed regulation does not address risks to public health, safety, or the environment.

Timetable:

Action	Date	FR Cite
NPRM	04/23/99	64 FR 19952
NPRM Comment Period End	06/22/99	
Final Action	09/00/00	

Regulatory Flexibility Analysis Required: No**Small Entities Affected:** No**Government Levels Affected:** State, Local, Federal

Agency Contact: Carol Miaskoff, Assistant Legal Counsel, Office of Legal Counsel, Equal Employment

Opportunity Commission, Room 6037, 1801 L Street NW, Washington, DC 20507

Phone: 202 663-4689

TDD Phone: 202 663-7026

Fax: 202 663-4639

RIN: 3046-AA68

3541. • CLARIFICATION OF STANDARDS IN INTERPRETIVE APPENDIX TO ADA REGULATIONS REGARDING MITIGATING MEASURES

Priority: Info./Admin./Other

Legal Authority: 42 USC sec 12111 et seq

CFR Citation: 29 CFR sec 1630, app sec 1630.2(h); 29 CFR sec 1630, app sec 1630.2(j)

Legal Deadline: None

Abstract: The Interpretive Appendix to the Equal Employment Opportunity Commission's regulations implementing title I of the Americans with Disabilities Act (ADA) currently states that mitigating measures, such as medication, should not be considered in assessing whether an individual has a disability within the meaning of the ADA. See 29 CFR 1630.2(h) and (j). The

Supreme Court, however, reached the opposite conclusion in three recent cases. See *Sutton v. United Airlines*, 119 S. Ct. 2139 (1999); *Murphy v. United Parcel Services*, 119 S. Ct. 2133 (1999); *Albertsons, Inc. v. Kirkingburg*, 119 S. Ct. 2162(1999). The EEOC, therefore, will issue a final rule amending its Interpretive Appendix by deleting all references to mitigating measures.

Timetable:

Action	Date	FR Cite
Final Action	07/00/00	

Regulatory Flexibility Analysis Required: No

Government Levels Affected: State, Local

Agency Contact: Christopher Kuczynski, Assistant Legal Counsel, Office of Legal Counsel, Equal Employment Opportunity Commission, 1801 L Street NW, Washington, DC 20507
Phone: 202 663-4503
TDD Phone: 202 663-7026
Fax: 202 663-4639

RIN: 3046-AA70

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

Long-Term Actions

3542. PROCEDURES—THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Priority: Substantive, Nonsignificant

Legal Authority: 29 USC 628, sec 115, Civil Rights Act of 1991

CFR Citation: 29 CFR 1626

Legal Deadline: None

Abstract: Section 115 of the Civil Rights Act of 1991 deleted references to the Portal to Portal Act from the private suit provisions of the Age Discrimination in Employment Act (ADEA) and replaced them with a requirement that suit be filed no later than 90 days after termination of proceedings or dismissal of a charge by EEOC. Accordingly, section 1626.7(a) is being deleted and section 1626.15(b) is being revised because they were both based upon the Portal to Portal Act. New sections are being added concerning termination of EEOC proceedings and the issuance of notices of the new 90-day limitation period.

Timetable:

Action	Date	FR Cite
NPRM	To Be Determined	

Regulatory Flexibility Analysis Required: No

Government Levels Affected: State, Local

Agency Contact: Thomas J. Schlageter, Assistant Legal Counsel, Office of Legal Counsel, Equal Employment Opportunity Commission, 1801 L Street NW, Washington, DC 20507
Phone: 202 663-4669
TDD Phone: 202 663-7026
Fax: 202 663-4639

RIN: 3046-AA54

3543. DISPARATE IMPACT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA)

Priority: Substantive, Nonsignificant

Legal Authority: 29 USC 628

CFR Citation: 29 CFR 1625.7 (Revision); 29 CFR 1625.23 (New)

Legal Deadline: None

Abstract: The Commission proposes to issue legislative regulations to reaffirm and clarify its long-standing interpretive rule regarding the availability of the disparate impact theory under the ADEA. The proposed rule also would set forth the nature and order of proof in such disparate impact cases.

Timetable: Next Action Undetermined

Regulatory Flexibility Analysis Required: No

Government Levels Affected: None

Agency Contact: Joseph N. Cleary, Assistant Legal Counsel, Office of Legal Counsel, Equal Employment Opportunity Commission, 1801 L Street NW, Washington, DC 20507
Phone: 202 663-4647
TDD Phone: 202 663-7026

EEOC

Long-Term Actions

Fax: 202 663-4639

RIN: 3046-AA64

**3544. • CONFORMING TREATMENT
OF FEDERAL SECTOR
ADMINISTRATIVE JUDGE DECISIONS**

Priority: Substantive, Nonsignificant

Legal Authority: 29 USC 206(d), 633(a),
791 and 794a; 46 USC 2000e-16

CFR Citation: 29 CFR 1614.204

Legal Deadline: None

Abstract: We propose to conform the
treatment of decisions by

administrative judges on class
complaints to the treatment of
decisions by administrative judges on
individual complaints; i.e., instead of
issuing recommended decisions on
reports of findings and
recommendations, administrative
judges will issue decisions that
agencies can either fully implement or
appeal.

Timetable: Next Action Undetermined

**Regulatory Flexibility Analysis
Required:** No

Small Entities Affected: No

Government Levels Affected: Federal

Agency Contact: Thomas J. Schlageter,
Assistant Legal Counsel, Office of Legal
Counsel, Equal Employment
Opportunity Commission, 1801 L Street
NW, Washington, DC 20507
Phone: 202 663-4669
TDD Phone: 202 663-7026
Fax: 202 663-4639

RIN: 3046-AA71

[FR Doc. 00-5302 Filed 04-21-00; 8:45 am]

BILLING CODE 6570-01-F